IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

In Re:	)	
	)	
	)	MDL Docket No. 1293
	)	
NATURAL GAS ROYALTIES	)	
QUI TAM LITIGATION	)	

ORDER ON MOTIONS TO DISMISS

This matter comes before the Court on the Coordinated Defendants' Motion to Dismiss, the Enogex Defendants' Motion to Dismiss, and Defendant Blue Dolphin Pipeline Company's Motion to Dismiss. The Court, having heard oral argument in this matter, having reviewed the several motions, Plaintiff's Response, having reviewed the other materials submitted by the parties, and being otherwise fully advised in the premises, FINDS and ORDERS as follows:

Background

The present cases were instituted by the Relator, Jack J. Grynberg ("Mr. Grynberg" or "Relator"), under the Federal False Claims Act ("FCA"), 31 U.S.C. § 3730(b).[1] The Defendants named in these cases are more than three hundred of the companies involved in the production and transportation of natural gas in the United States. The complaints at issue allege a number of methods by which the Defendants have systematically mismeasured either the volume or heating

[1] Although a number of tag-along actions have been transferred to the Court that were not instituted by Mr. Grynberg, this order addresses those motions that were briefed and argued before the Court on March 17, 2000. The motions dealt with in this order challenge the validity of the complaints filed by Mr. Grynberg.

content of natural gas taken from federal lands. The alleged result of these improper measurement techniques is that the Defendants have also systematically deprived the government of its rightful royalties on the natural gas extracted by the Defendants from federal lands.

These cases come before the Court having a significant procedural history. In 1995, Mr. Grynberg filed a similar complaint under 31 U.S.C. § 3730(b) against measurers of natural gas. The former action, "*Grynberg I,*" was brought in the United States District Court for the District of Columbia. The previous case involved approximately seventy defendants. Ultimately the prior action was dismissed on two grounds. First, the district court concluded that the parties had been improperly joined under FED. R. CIV. P. 20(a). *U. S. ex rel. Grynberg v. Alaska Pipeline Co., et al.*, No. 95-725 (TFH), at 5 (D. D.C. March 27, 1997) (unreported memorandum opinion) *aff'd sub nom. U.S. ex rel. Grynberg v. ANR Pipeline Co., et al.*, No. 98-5224 (D.C. Cir. Oct. 6, 1998). Second, the district court concluded that the Relator's amended complaint failed to state a claim in light of the heightened pleading requirements of FED. R. CIV. P 9(b). *Id*. at 10.

The complaint filed in *Grynberg I* described ten practices that result in the undermeasurement of gas and its heating content. The complaint alleged that each defendant employed at least one of the ten techniques described, and alleged that each defendant submitted royalty statements based on the incorrect measurements. The complaint did not identify the time or place where any of the defendants engaged in the practices, except to state that the defendants had engaged in the practices on some unnamed federal or Indian lands at some unspecified time within the statute of limitations period.

Following the decision of the district court in *Grynberg I*, the Relator instituted the present cases in a number of federal jurisdictions throughout the United States. A number of the

present cases originated in the District of Wyoming and were consolidated before this Court. The majority of these cases were transferred to this Court by order of the Judicial Panel on Multidistrict Litigation pursuant to its authority under 28 U.S.C. § 1407.

The Current Grynberg Complaints

The current series of complaints filed by Mr. Grynberg are not entirely uniform, but do share a number of common elements.[2] The present lawsuits challenge Defendants' measurement of the volume and analysis of the heating content of natural gas, allegedly causing substantial underpayments of royalties to the United States. Relator contends that in properly calculating those royalties, it is crucial that the heating content and volume of the gas be analyzed and measured accurately pursuant to federal law as well as federal regulations and the industry standards those regulations incorporate. (Compl. ¶ 1.) Relator alleges Defendants have knowingly (within the meaning of 31 U.S.C. § 3729(b)) underreported the heating content and volume of that gas by undermeasuring and misanalyzing it in the ways described in paragraphs 32-54 of his complaints (referred to by Relator as "Mismeasurement Techniques"). (Compl. ¶¶ 1, 9, 20.)

Natural gas is measured on the basis of two factors: its heating content and its volume. *Id*. ¶ 16. Heating content is analyzed and expressed in "British Thermal Units" ("BTU's") per cubic foot; volume is measured in units of one thousand cubic feet ("MCF's"). To calculate the value of a given amount of natural gas one would multiply the heating content in BTU's per cubic foot by the volume in cubic feet, thus creating a product measured in millions of BTU's, or

[2] Not all of the complaints in the cases now before the Court are identical. The Court will analyze the issues raised in the various motions to dismiss in terms of representative or characteristic clauses used in the complaints, except where otherwise required.

"MMBTU's." Natural gas has historically been valued and sold throughout the natural gas industry on the basis of a price per MMBTU. Pricing on a MMBTU basis has been prescribed by federal law since implementation of Order 699 by the Federal Power Commission in 1974. *Id*.

Relator represents that royalties owing to the United States for natural gas produced from federal lands have been calculated as a percentage of the value of the gas so produced, which is directly affected by the gas's measured MMBTU's. *Id*. ¶¶ 1, 17. Thus, Relator alleges, *accurate* techniques for measuring the MMBTU of gas produced from these properties are required by federal law, as well as by federal regulations and industry standards, in order to correctly calculate those royalty payments. *Id*. ¶ 17. Specifically, the Federal Oil and Gas Royalty Management Act ("FOGRMA") directs the Secretary of the Interior to "establish a comprehensive . . . system to provide the capability to accurately determine oil and gas royalties." 30 U.S.C. § 1711(a). The Act also imposes penalties on "[a]ny person who . . . knowingly or willfully prepares, maintains, or submits false, inaccurate, or misleading reports, notices, affidavits, records, data, or other written information[.]" 30 U.S.C. § 1719(d).

Federal regulations adopted pursuant to FOGRMA and other legislation govern the manner in which gas produced from federal lands must be measured and analyzed. Relator alleges that those regulations require the *accurate* volume measurement and heating content analysis of gas, citing as an example the Onshore Oil and Gas Order No. 5, Measurement of Gas ("Order No. 5"), 54 Fed. Reg. 8100 ("The order will benefit overall . . . by providing the minimum standards critical to accurate measurement and reporting of production nationwide."). (Compl. ¶ 18.) The federal regulations have adopted certain industry standards which have been formulated by various organizations including the American Gas Association ("AGA"), the Gas Processors

Association ("GPA"), the American Petroleum Institute ("API"), and the American Society of Testing and Materials ("ASTM"). *Id*. Like the regulations that adopt them, the industry standards require the accurate volume measurement and heating content analysis of natural gas. *Id*. (citing as an example AGA Report No. 3 § 4.1 ("The primary consideration in the design of a metering station is sustained accuracy.")).

Under contracts commonly used in the natural gas industry, natural gas transmission companies and other purchasers, gatherers, and/or transporters of natural gas (collectively referred to as "Gas Measurers") have routinely been responsible for measuring the volume and analyzing the heating content of gas which they gather, purchase, and/or transport. *Id*. ¶¶ 8, 19-20. Thus, the MMBTU value of natural gas produced from federal lands has been measured and determined by Gas Measurers such as Defendants; and those MMBTU measurements have been used to determine the value of natural gas, and hence the amount of royalties owing to the United States. *Id*. ¶ 20. Accordingly, royalty payments to the United States have been made either by lessees of those lands in reliance on information furnished by the Gas Measurers, or by the Gas Measurers themselves, on the basis of their own MMBTU determinations obtained from their gas volume measurements and gas heating content analyses. Relator alleges that the Mismeasurement Techniques used by Defendants to arrive at those determinations are all inconsistent with federal law and regulations, as well as industry standards. *Id*. ¶ 18.

Relator also alleges that Defendants measure and analyze natural gas differently at the point of intake and at the point of later delivery. *Id*. ¶¶ 21-25. Defendants have allegedly been in control of the MMBTU measurement and analysis process at the point of purchase or input into a gas gathering line and/or gas pipeline (where royalty measurements are taken), as well as (directly

or through subsidiaries or affiliates) the process at any later point where the gas is resold or otherwise conveyed. *Id*. ¶ 22. Relator states that the true heating content of natural gas should remain the same at any point along its path. However, by using different techniques, procedures, or assumptions in the measurement and analysis process, one can significantly (and inaccurately) alter the results of the gas's measured MMBTU value. *Id*. ¶ 21. Such selective measurement and analysis techniques, yielding a lower MMBTU value at the point of purchase or input and a higher MMBTU value at the point of resale or conveyance, result in the unjust enrichment of the Defendants and/or their affiliates. *Id*. ¶ 23.

A) Alleged Mismeasurement Techniques

In paragraphs 32-41 of his complaints, Relator describes certain Mismeasurement Techniques affecting the heating content. The heating content of natural gas is determined from a sample which, according to industry standards such as ASTM 5503-94 § 5, must be "representative" of the gas stream as a whole. (Compl. ¶ 32.) Natural gas normally ranges from the lightest hydrocarbon to heavier weight hydrocarbons. The heavier the weight of the hydrocarbon, the greater is its BTU value. By obtaining an unrepresentatively light gas sample, one can dramatically understate the gas's true BTU content. Relator alleges that Defendants do this by extracting gas for heating content analysis at a strategic location (the "BTU Extraction Point") situated too close "downstream" – closer than is permitted by the applicable industry standards – to flow disturbing devices such as the orifice used to measure gas volume. *Id*. ¶ 32. In a number of subparagraphs, Relator specifically describes how this technique results in an unrepresentatively low heating content and how it allegedly violates industry standards. *Id*. ¶¶ 32(a) - (i).

Next, Relator alleges that Defendants locate the BTU Extraction Points anywhere from 100 to over 300 feet downstream from the separator unit and/or dehydrator unit causing the gas to cool to temperatures far below those that exist in the producing field or in the well. *Id*. ¶ 33. The heavier gas elements, which have a higher heating content, liquify and separate as they cool, yielding an unrepresentative gas sample that understates the percentage of hydrocarbons with a higher BTU content. *Id*. The applicable regulations and industry standards recognize that it is imperative to obtain the gas sample at a temperature representative of the true well temperature. *Id*. (citing as examples API 14.1.5.4.2; ASTM 5503-94 § 5). Relator further alleges that Defendants extract gas samples for heating content analysis by means of a steel sample container or similar device which causes inappropriate pressure and temperature drops in the gas being sampled, without compensating for those drops. Again, in three subparagraphs, Relator specifically describes the nature of this alleged mismeasurement technique. *Id*. ¶¶ 34(a)-(c).

Relator alleges that the already unrepresentatively light gas sample is still further restricted as Defendants transport the gas sample from the BTU Extraction Point to a laboratory and transfer it to a "chromatograph" where its heating content is analyzed. *Id*. ¶ 35. This allegedly causes the pressure to drop in the gas sample container, again leading to an unrepresentatively lower heating content than the gas in the gas sample container. *Id*. This technique allegedly violates, among other standards, API Chapter 14.1.9, 14.1.16.3-.4, and GPA 2261-95 §§ 6, 7.

Relator also alleges that, after all of the inappropriate procedures described above, Defendants then compound the wrong by analyzing the heating content of only lighter weight (lower BTU) hydrocarbons in violation of applicable regulations and industry standards. *Id*. ¶ 36. In addition, Relator alleges that Defendants filter out (without measuring) the heavier weight

hydrocarbons before the gas enters the chromatograph, thus arbitrarily excluding the heavier weight hydrocarbon components from the heating content analysis. *Id*. ¶ 37. Relator acknowledges that industry standards provide that a filter may be used when the gas exits the gas sample container before entering the chromatograph; however, Relator maintains that the gas sample being measured must be representative of the gas stream as a whole. The purpose of the filter, Relator asserts, is to eliminate possible impurities from the natural gas sample entering the chromatograph, not a means by which Defendants may eliminate heavier gas molecules from the gas sample being analyzed. When a filter is used, Defendants must, but allegedly do not, account for the heating content of the filtered-out hydrocarbons. *Id*.

Next Relator alleges that even if Defendants analyzed the heating content of natural gas at the appropriate pressure, Defendants test the gas at an inappropriate temperature, causing the gas being sampled to yield an unrepresentatively low heating content. *Id*. ¶ 38. In paragraph 39, Relator discusses the formula that exists for converting analyzed "dry" gas to the so-called "wet" basis. Gas is referred to as "dry" or "wet." *Id*. ¶ 39. The chromatograph analyzes gas on a "dry" basis only. However, Relator represents that most gas contracts call for gas to be delivered and paid for on a "wet" basis. Relator contends that Defendants plug incorrect values into the conversion formula to their advantage and to the detriment of the United States. Relator then specifies the manner in which this is done by Defendants. *Id*.

Finally, with respect to those Mismeasurement Techniques affecting heating content, Relator alleges that Defendants have failed to examine the reported heating content values for gas from a given well to determine whether and why they vary inappropriately over time. *Id*. ¶ 40. Relator also alleges that, as part of the need to obtain a gas sample representative of the gas

stream as a whole, industry standards require "a sampling interval [to] be carefully chosen so that the collected sample reflects" any changes in a pipeline's flow rate. *Id*. ¶ 41 (citing API Chapter 14.1.8.1). Relator contends that the sampling system employed by Defendants does not satisfy this standard.

In paragraphs 42-54, Relator describes certain Mismeasurement Techniques affecting volume, or both volume and heating content. First, Relator alleges that Defendants inappropriately subtract sums from amounts paid to producers in ways that cause the underpayment of royalties to the United States. *Id*. ¶ 42. Specifically, Relator asserts that Defendants use "fuel gas" (the natural gas used to run production, processing and transportation machinery) to operate their own machinery outside the field premises without measuring or reporting any of the fuel gas usage, in violation of the standard federal lease. Relator also asserts that Defendants deduct amounts in excess of the "reasonable actual costs incurred" for transportation services. *Id*.

Relator next alleges that Defendants utilize mechanically operated gas meters which chronically underreport the volume of gas at the point of purchase. *Id*. ¶ 43. Relator maintains that these meters record gas production accurately only within a limited range and that Defendants measure the volume of gas outside of that permitted range. *Id*. Also, Defendants allegedly do not calibrate the equipment used in the analysis of heating content and the measurement of volume as often as is required by the applicable regulations and industry standards. *Id*. ¶ 44 (citing as examples 30 C.F.R. 250.181(c)(3); Order No. 5 § III.C.13-19).

In paragraphs 45-47, Relator asserts that Defendants only recently adopted revised procedures for correcting for the inert content of the gas, have used incorrect Beta ratios, and

have failed to use the new formula for calculating the volume of gas. Relator further asserts that Defendants constructed, or caused the construction of, the gathering line in such a manner as to create many unnecessary obstructions, creating a disruption in the gas flow which causes volume to be undermeasured. *Id*. ¶ 48. In addition, Defendants allegedly have recovered condensate without paying royalties or reporting such condensate recovery to the lessee; and, either use a larger orifice size than that reported on the gas meter charts or use an orifice that has been chipped. *Id*. ¶¶ 49-50.

In paragraph 51 and its subparagraphs, Relator describes Defendants' allegedly improper use of a portable chromatograph to perform the gas sample heating content analysis directly in the field. In paragraph 52 and its subparagraphs, Relator describes the manner in which he alleges the Defendants engage in transactions that are not "arm's length," while nevertheless reporting the value of gas sold as if the transactions were "arm's length." Finally, Relator asserts that Defendants improperly deduct amounts in excess of allowable "reasonable actual costs of processing" or take inappropriate deductions for processing-related services, and that Defendants do not report the processor's portion of production for royalty payment purposes. *Id.* ¶¶ 53, 54. Relator maintains that all of the above-described Mismeasurement Techniques are done in violation of applicable regulations and/or industry standards.

B) Claim for Relief

Relator asserts that the "unmistakable purpose of federal law and regulations, as well as the industry standards the regulations incorporate, is that natural gas produced from federal lands be measured and analyzed accurately, so that proper royalties are paid to the United States Government." (Compl. ¶ 55.) Relator claims that Defendants have violated the False Claims Act,

31 U.S.C. § 3729(a)(7), by knowingly employing "volume measurement and heating content analysis procedures which systematically underreport to the United States Government the volumes and heating content of natural gas produced from Royalty Properties." *Id*. Relator claims that as a direct and proximate result of the Mismeasurement Techniques, the United States has not been paid full and appropriate royalties due and owing for the production of natural gas from federal lands. *Id*. ¶ 57.

The Motions to Dismiss

Most of the Defendants in these cases have joined in either the Coordinated Defendants' Motion to Dismiss or the Enogex Defendants' Motion to Dismiss. The Coordinated Defendants' Motion to Dismiss is based upon FED. R. CIV. P. 8(a), 9(b), and 12(b)(6). The Enogex Defendants' Motion to Dismiss is based on the same procedural rules.[3] Defendant Blue Dolphin Pipeline Company's Motion to Dismiss is founded on FED. R. CIV. P 9(b), but differs from the other motions because it argues that Blue Dolphin Pipeline Company is qualitatively different from the other Defendants in these cases. Blue Dolphin's Motion depends on its argument that it has only one metering facility on its pipeline, and that it is fundamentally incapable of the type of mismeasurement practices alleged in the complaints.[4]

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[3] Due to the procedural similarity between the Coordinated Defendants' Motion to Dismiss and the Enogex Defendants' Motion to Dismiss, the Court will proceed with a combined analysis of the two motions.

[4] Defendant Blue Dolphin Pipeline Company also made an argument that the *qui tam* provisions of the FCA might be unconstitutional. This issue was discussed with all parties at oral argument. The argument was based in part on the holding in *United States ex rel. Riley v. St. Luke's Episcopal Hospital*, 196 F.3d 514 (5th Cir. 1999) *reh'g en banc granted by United States ex rel. Riley v. St. Luke's Episcopal Hospital*, 196 F.3d 561 (5th Cir. 1999). However, the Court

The Standard of Review Under Federal Rule of Civil Procedure 12(b)(6).

The standard of review applied to a motion to dismiss for failure to state a claim is well-established. This Court must accept as true the Plaintiff's well-pleaded factual allegations and construe them in a light most favorable to plaintiff. *Maez v. Mountain States Tel. and Tel., Inc.*, 54 F.3d 1488, 1496 (10th Cir. 1995); *see also* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1263, at 460-61 (2d ed). Dismissal for failure to state a claim is appropriate only if the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *Maez,* 54 F.3d at 1496. The Tenth Circuit Court of Appeals has stated that, at this stage, this Court's "function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Blanz,* 948 F.2d 1562, 1565 (10th Cir. 1991). The Federal Rules of Civil Procedure create a strong presumption against rejection of pleadings for failure to state a claim. *Maez*, 54 F.3d at 1496.

In addition, at issue in the present motion is the consideration of materials submitted outside of the pleadings. This raises the issue of whether or not to convert the motion under FED. R. CIV. P. 12(b)(6) to a motion for summary judgment under FED. R. CIV. P. 56. "The court has

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believes this argument is undermined by the recent Supreme Court decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S.Ct. 1858 (2000), which implicitly accepted as constitutional the *qui tam* provisions of the FCA and held that a private individual has standing to bring a suit on behalf of the United States under the FCA *Id*. at. 1865. The Court recognizes, however, that the Supreme Court refused to decide two other constitutional challenges that have been made elsewhere to the *qui tam* provisions of the FCA. *Id*. at 1865, n. 8. The Court does not believe any of these constitutional issues are properly presented for decision at this time. It is worth noting that at least one other district court within the Tenth Circuit has rejected these constitutional challenges to the FCA. *United States ex rel. Wright v. Cleo Wallace Centers*, 132 F. Supp. 2d 913 (D. Colo. 2000) (unpublished opinion).

complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion." Wright and Miller, *supra*, § 1366, at 491. "When the extra-pleading material is comprehensive and will enable a rational determination of a summary judgment motion, the court is likely to accept it; when it is scant, incomplete, or inconclusive, the court probably will reject it." *Id.* at 493. Considering the complexity of the issues raised by the Relator's Complaints, the defenses that are likely to be asserted by the various Defendants, and the scope of the materials that would be required to properly resolve a motion for summary judgment in these cases, the Court will not convert the present motions. Accordingly, the Court will constrain its review to the pleadings and the materials directly cited and relied upon in the pleadings.

Discussion

Federal Rule of Civil Procedure 8(a).

The Defendants have argued that the Relator's complaints fail to satisfy even the minimal requirements of FED. R. CIV. P. 8(a). The Defendants argue that the complaints contain insufficient information to put the Defendants on notice of what conduct forms the basis of the Relator's claims. The text of FED. R. CIV. P. 8(a) reads as follows:

> **(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction so support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

The plain language of Rule 8(a)(2) indicates that its requirements are not exacting. A

"short and plain statement of the claim" is meant to be just that, as the case law has consistently confirmed. The courts have interpreted Rule 8(a)(2) to require only that amount of information that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Mahone v. Addicks Util. Dist. of Harris County*, 836 F.2d 921, 926 (5th Cir. 1988); *see also Cayman Exploration Corp. v. United Gas Pipe Line*, 873 F.2d 1357, 1362 (10th Cir. 1989). The complaint must contain either direct allegations on every element necessary to sustain recovery or contain allegations from which the inference may be drawn that evidence on these elements will be introduced at trial. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995); *see also* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216, 156-159 (2d ed).

This action is maintained under 31 U.S.C. § 3729(a)(7), which provides that any person is liable to the United States Government who "knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government." Claims brought under this section are commonly referred to as "reverse" false claims. The question before the Court, then, is whether or not the Relator's Complaints sets forth a reverse false claim, and the grounds upon which it rests, with sufficient detail as to provide the Defendants with fair notice of the Relator's claim such that the Defendants can answer thereto.

The Relator has alleged that the Defendants "submitted or caused to be submitted inaccurately low, false measurements to the Department of the Interior every month since at least as early as 1985, and those false reports have regularly been sent or caused to be sent to the Department of the Interior ever since." (Compl. ¶ 9.) Thus, the Relator has asserted a direct

allegation that the Defendants submitted false records to the Department of the Interior on a regular, if not monthly, basis since 1985. The Relator has also set forth the grounds upon which he asserts that the Defendants submitted false claims.

The Relator alleges that he and his employees have undertaken an investigation of the gas measurement techniques utilized by the Defendants and have concluded that the Defendants:

> have taken advantage of the complex and sophisticated methods used to measure the volume and analyze the heating content of natural gas by selectively and inaccurately measuring volume and improperly analyzing the heating content of the gas being gathered, purchased, and/or transported, resulting in widespread underreporting of the volume and heating content of that gas.

(Compl. ¶ 8); *See also* Compl. ¶ 4.

The Relator alleges that he obtained knowledge regarding the measurement techniques used by the Defendants through "his review of Defendants' business practices, his (or his agents') conversations with Defendants' representative[s] regarding their measurement practices before this suit was filed, his knowledge from his experience as a professional engineer, a scientist, a consultant, and a gas producer in the industry for over 40 years." (Compl. ¶ 30.)

The Relator goes on to allege, with more specificity, the exact methods used by the defendants to mismeasure and underreport the heating content and volume of natural gas produced from federal lands. The Relator directly asserts that each Defendant engaged in mismeasurement in "at least the ways described in paragraphs 32-54 [of the Complaint]." (Compl. ¶ 19.) These alleged techniques are set forth in considerable detail in paragraphs 32-54 of the Complaint. Furthermore, it is repeatedly alleged that the Defendants made the reports to the government with the requisite intent to satisfy the definition of "knowing" set forth in 31 U.S.C. §3729(b). *See* Compl. ¶¶ 9, 20, 55, 56.

The allegations contained in the Complaints are not only direct, but also lead to the inference that evidence will be produced in support of the allegations during discovery and introduced at trial. The Relator having directly alleged information relating to every element necessary to sustain a recovery, the Court finds that the Complaints contain sufficient detail to provide the Defendants with notice of the allegations contained therein and the grounds on which they rest. The Court concludes that the Relator's allegations are set forth with more than enough specificity to satisfy FED. R. CIV. P. 8(a).

Federal Rule of Civil Procedure 9(b)

The Defendants contend, and the Relator does not deny, that actions brought under the F.C.A are subject to the heightened pleading requirements of FED. R. CIV. P. 9(b). *See United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir. 1999); *United States ex rel. Thomson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1998); *Gold v. Morrison-Knudson Co.*, 68 F.3d 1475, 1476-77 (2nd Cir. 1995). The same is true of so-called "reverse" false claims. *Pickens v. Kanawha River Towing*, 916 F.Supp. 702, 706 (S.D. Ohio 1996) (where court applied Rule 9(b) to both reverse false claim and another FCA claim). In considering a Rule 9(b) motion, the Court must carefully confine its analysis to the text of the complaint and accept as true the pleaded facts. *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000); *Scwhartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1251 (10th Cir. 1997).

The text of FED. R. CIV. P. 9(b) is as follows:

Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake,

> the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

In *Schwartz v. Celestial Seasonings, Inc.*, the Tenth Circuit succinctly described the analysis under Rule 9(b):

> Rule 9(b) requires only the identification of the circumstances constituting fraud . . . it does not require any particularity in connection with an averment of intent, knowledge or condition of mind.
>
> The requirements of Rule 9(b) must be read in conjunction with the principles of Rule 8, which calls for pleadings to be "simple, concise, and direct, . . . and to be construed as to do substantial justice." The purpose of Rule 9(b) is "to afford defendant fair notice of plaintiff's claims and the factual ground upon which [they] are based . . . ." Simply stated, a complaint must "set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof."

Schwartz, 124 F.3d at 1252 (citations omitted).

As the Defendants have argued, Rule 9(b) "serves to discourage the initiation of suits brought solely for their nuisance value, and safeguards potential defendants from frivolous accusations of moral turpitude." *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981). "Rule 9(b) . . . safeguards [a] defendant's reputation and goodwill from improvident charges of wrong doing . . . and it serves to inhibit the institution of strike suits." *Farlow*, 956 F.2d at 987 (citing *Ross v. Boulton*, 904 F.2d 819, 823 (2d Cir. 1990)). In addition, Rule 9(b) prevents plaintiffs from first filing lawsuits alleging fraud, only to search out all of the facts in support of the cause of action during discovery. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999). However, each authority cited to this Court that addresses the issue in detail has acknowledged "the rules of civil procedure are not to be strictly construed," *Cannon*, 642 F.2d at 1386, and that Rule 9(b) is not to be focused on in isolation but

in conjunction with the principles of Rule 8, *Schwartz,* 124 F.3d at 1252.

Noted commentators Charles Alan Wright and Arthur Miller take the position that "[t]he proper balance between the simplicity sought in Rule 8 and the particularity required by Rule 9 is demonstrated by the illustrative fraud claim set out in Official Form 13, which is expressly declared to be a sufficient pleading by Rule 84." Wright and Miller, *supra*, § 1298, at 623-24. In turn, Form 13 sets forth an extremely simple statement of what must be pled in order to set aside a fraudulent conveyance under FED. R. CIV. P. 18(b). Wright and Miller take the position that "it is inappropriate to focus exclusively on the fact that Rule 9(b) requires particularity in pleading fraud. This is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules." Wright and Miller, *supra*, § 1298, at 621.

The Defendants, particularly the Enogex Defendants, have argued for a stringent application of Rule 9(b). The Enogex Defendants have demanded that the Relator plead his claims in terms of "the specific day, month and year" that the measurement occurred; "the specific names of employees" who measured the gas and filed reports with the Government; "the particular natural gas well on the particular royalty property" from which the gas was extracted; "the date of the claimed false statement;" and the "specific claimed undermeasurement." "Enogex Brief" at 34-36. This exacting standard is simply not what Rule 9(b) requires, nor is it consistent with the underlying purpose of the Federal Rules of Civil Procedure and the case law thereunder.[5]

[5] A close examination of the authorities reveals that there are categories of cases in which the courts have applied Rule 9(b) in an especially strict, almost punitive, manner. Those cases involve allegations of securities fraud and cases arising under the Racketeer Influenced and Corrupt Organizations Act. *See, e.g., Farlow*, 956 F.2d 982. This tendency was noted in Wright and Miller, *supra,* § 1297, at 615. The Court is not persuaded that Rule 9(b) should be applied in this stringent manner, particularly where, as here, the plaintiff has attempted to set forth a complex fraudulent scheme rather than an isolated instance of fraud. *See, e.g., Sunbird Air Servs.*

"[T]o meet the requirements of Rule 9(b) a complaint need not 'recite the evidence or plead detailed evidentiary matter.' Similarly, Rule 9(b) does not require particularity to the degree so as to supplant general discovery methods." *Sunbird Air Servs. Inc. v. Beech Aircraft Corp.*, 789 F. Supp. 364, 366 (D. Kan. 1992); *see also Carlstedt*, 800 F.2d at 1011 (citing authority that Rule 9(b) does not require the pleading of detailed evidentiary matter). To require the Relator to plead his claim in the degree of detail requested by the Defendants would result in voluminous pleadings containing detailed evidentiary matter and would actually inhibit the Defendants' ability to formulate a response. *See United States ex rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204, 207 (E.D. Tex. 1998) (where, in a hauntingly familiar oil royalty case, the court concluded complying with defendants pleading requirements "would cause the complaint to be in the hundred[s] of pages, if not hundreds of pounds").

Inc. v. Beech Aircraft Corp., 789 F. Supp. 364, 366 (D. Kan. 1992); *United States ex rel. O'Keefe v. McDonnell Douglass Corp.*, 918 F. Supp. 1338, 1345 (E.D. Mo. 1996); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1039 (S.D. Tex. 1998); 2A James W. Moore, Moore's Federal Practice § 9.03[1] at 9-30 to 9-31 (2d ed. 1996).

Another dispute with regard to the application of Rule 9(b) is the extent to which a plaintiff may plead based upon information and belief consistent with the Rule's demand for particularity. The Relator has attached an "Exhibit B" to each of his Complaints. The Relator contends that each Exhibit B sets forth the royalty properties on which the Defendants or their affiliates have been the "direct payors of royalties to the United States Government." (Compl. ¶ 27.) In addition, the Relator contends that the Defendants conduct business with unknown "others" who also account for gas from royalty properties. The Relator believes the Defendants' mismeasurements cause these unknown entities to underpay royalties. *Id.* The Relator contends that these business relationships, as well as many of the specific details of the Defendants' business activities on their own royalty properties, are "peculiarly within the Defendants' knowledge." (Compl. ¶¶ 27, 28.) The Court is convinced that, based on the Relator's allegations, certain of this information is within the exclusive control of the Defendants. Therefore, the Court finds that discovery is appropriate on these issues. *See Downy*, 118 F. Supp. 2d at 1173. The Court is of the opinion that, should the Relator be unable to prove specific instances in support of his claims, the claims can be more effectively assessed at the summary judgment stage. *Id.*

Having set forth the contours of what is required by Rule 9(b), the Court will now turn to the allegations contained in the Relator's Complaint. Although the scienter requirement of 31 U.S.C. § 3729(b) is quite relaxed, Rule 9(b) itself exempts averments of malice, intent, knowledge or condition of mind from its heightened pleading requirements. As stated by the Tenth Circuit, Rule 9(b) does not "require any particularity in connection with an averment of intent, knowledge, or condition of mind. It only requires identification of the circumstances constituting fraud or mistake." *Seattle-First Nat'l Bank v. Carlstedt*, 800 F.2d 1008, 1011 (10th Cir. 1986) (citing *Trussell v. United Underwriters, Ltd.*, 228 F.Supp. 757, 774-75 (D.Colo. 1964)). Therefore, the Court accepts the Relator's allegations as to the Defendants' scienter as sufficient, and need only consider whether the Relator has satisfactorily set forth the circumstances constituting fraud.

Here, the Relator has alleged a fraud that consists of a series of false statements submitted to the government. The Complaint makes clear that the Relator is asserting that all of the monthly reports submitted to the Department of Interior since 1985 in which the Defendants accounted for natural gas extracted from federal lands were based on erroneous information. (Comp. ¶¶ 9, 26). While the Court agrees that perhaps the Complaint could be more detailed in its description of the system by which the Defendants report information to the government, requiring the Relator to catalogue every monthly statement submitted by the Defendants would be to require the Relator to plead evidentiary matters. Under the circumstances, the Relator has adequately identified the false statements made by the Defendants, as well as the time and place at which the statements were made. While the Defendants are no doubt appalled by the enormous scope of the fraud alleged, the Complaint identifies the false statements with sufficient particularity to allow the Defendants to review the reports and respond to the Relator's allegations.

The content of the false representations is the real focus of the Relator's Complaint. The Relator has asserted that the Defendants engaged in systematic mismeasurement practices, and has outlined those practices in detail. *See* "Alleged Mismeasurement Techniques," *supra*. Again, to require the Relator to plead the exact well and lease from which the gas was extracted and the precise margin by which each report underrepresented either the volume or the heating content of the natural gas, would be to require the Relator to submit evidence. The Complaint, as it stands, allows the Defendants to admit or deny the Relator's averments as required by FED. R. CIV. P. 8(b). Furthermore, the Complaint provides sufficient information to allow the Defendants to state their affirmative defenses, if any.[6]

The Defendants have argued that the Relator's complaint must identify the persons making the mismeasurements and the specific employees making the statements to the government. However, the Court is persuaded that, considering the nature of the Relator's allegations, the better-reasoned cases on this issue are those that require only the identification of the parties and not the individual employees involved in the misconduct. *See United States ex rel. Pogue v. American HealthCorp, Inc.*, 977 F. Supp. 1329, 1332 (M.D. Tenn. 1997); *United States ex rel. Downy v. Corning, Inc.*, 118 F. Supp. 2d 1160, 1173 (D. N.M. 2000); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1049 (S.D. Tex. 1998). Therefore, the Court finds that the Relator has satisfied Rule 9(b) by identifying the individual Defendants as the parties making false statements.

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[6] The Court would add that, while it expects the Defendants will deny all of the Relator's allegations and controvert the substance of the alleged mismeasurement practices, the Court fully expects that "[d]enials shall fairly meet the substance of the averments denied." FED. R. CIV. P. 8(b).

Lastly, the Complaints must state the consequences of the alleged false statements. The current Complaints repeatedly allege that the statements, together with the incorrect data on which the statements are based, caused "substantial underpayments of royalties to the United States." (*See, e.g.*, Compl. ¶¶ 1, 8, 9, 26, 55, 57.) Although not the subject of this lawsuit, the Complaints also make clear the Relator's belief that other, non-federal, royalty holders have also been denied their rightful royalty payments. There is simply no valid argument that the Complaints are not clear regarding the consequences of the alleged fraud.

Like the court in *Downy*, the Court has some concern that the Relator has not alleged any specific instances of fraud within the general mechanics of the fraudulent scheme outlined in the Complaints. *Downy*, 118 F. Supp. 2d 1173. However, keeping in mind that Rule 9(b) does not require perfect pleadings, or evidentiary detail, but that the primary purpose of the pleading standard is to ensure that Defendants receive notice of the charges against them, the Court finds that the Complaints satisfy the requirements of Rule 9(b).

Failure to State a Claim Under Rule 12(b)(6)

In order to state a claim under § 3729(a)(7) of the FCA, a relator must allege that (1) the defendant *knowingly* made, used, or caused to be made or used, a *false* record or statement; and (2) the false statement or record was made or used to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government. The statute defines "knowingly" to mean that "a person, with respect to information– (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b).

Defendants contend that the Relator's complaints fail to allege the necessary elements of a FCA case. First, the Defendants argue that many of the alleged Mismeasurement Techniques involve a scientific dispute over the best way to measure gas.[7] Specifically, Defendants maintain that statements which are scientifically disputable are not "knowingly false" within the meaning of the FCA. "Disagreements over scientific methodology do not give rise to False Claims Act liability." *U.S. v. Regents of Univ. of California*, 912 F. Supp. 868, 886 (D. Md. 1995) (citing *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815-16 (9th Cir. 1995); *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992)).

While the Court acknowledges the findings in the foregoing cases, those courts were addressing the issue at the summary judgment stage of the proceedings. Considering Relator Grynberg's allegations in the light most favorable to him, and accepting the well-pled facts as true, the Court finds that the complaints do not present a mere dispute over scientific methodology. Rather, Relator specifically alleges that, through the use of certain Mismeasurement Techniques, Defendants knowingly undermeasured the volume and wrongfully analyzed the heating content of natural gas produced from federal lands, and then knowingly submitted these false measurements to the Department of the Interior. For purposes of the pending 12(b)(6) motions, the Court cannot properly consider extraneous argument and/or evidence on whether the alleged Mismeasurement Techniques involve a scientific dispute not

[7] The Coordinated Defendants specifically challenge the following paragraphs of Relator's complaints on this ground: ¶¶ 32(b), 32(g), 32(h), 32(i), 33, 34, 35, 36, 37, 39, 41, 43, 45, 46, 47, 48, and 51 (the alleged misuse of portable chromatographs is not contained in every complaint). (Appendix 2, Coordinated Defs. Mem. P. & A.) The Enogex Defendants specifically challenge many of the same allegations on this ground: ¶¶ 32, 34(b) & (c), 35, 36, 37, 40, 41, 43, 45, 48, and 51.

giving rise to liability under the FCA.

Second, Defendants argue that a statement made in compliance with government regulations cannot be false within the meaning of the FCA. Defendants further argue that, in an area that is heavily regulated – as is gas measurement from federal lands – a statement based on a standard practice that is not prohibited by the regulations cannot be false.[8] In his Complaints, Relator repeatedly alleges that certain industry standards and federal regulations require defendants to measure "Royalty Gas" in a certain way and that Defendants knowingly mismeasure that gas in contrary ways. Defendants challenge such allegations as conclusory and insufficient to state a claim.

Defendants are correct in stating that many of the alleged Mismeasurement Techniques are not *specifically* prohibited by the federal regulations and/or industry standards referenced in the Complaints. However, Relator's allegations center around the contention that the applicable regulations and industry standards require Defendants to employ techniques that will ensure the accurate measurement and reporting of natural gas production on federal lands. (Compl. ¶¶ 17, 18.) Where the regulations and industry standards are silent, Relator alleges that Defendants have knowingly under-measured the MMBTU value of Royalty Gas, in ways which violate the engineering or chemical principles on which other regulations and industry standards are based.

Relator cites to many regulations and industry standards in support of his contention. Order No. 5 provides that "[this] order will benefit overall . . . by providing the minimum

[8] The Coordinated Defendants specifically challenge the following paragraphs on these grounds: ¶¶ 32(b), 32(g), 32(h), 32(i), 33, 34, 35, 36, 37, 41, 43 and 48. The Enogex Defendants specifically challenge many of the same paragraphs on one or both of these grounds: ¶¶ 32(a)-(d), 32(f)-(i), 33, 34(a) & (b), 35, 36, 37, 40, 41, 43, 51, 52(b).

standards critical to accurate measurement and reporting of production nationwide." (Compl. ¶ 18.) AGA Report No. 3 § 4.1 states, "The primary consideration in the design of a metering station is sustained accuracy." *Id.* API Chapter 14 begins by stating, "Measurement is the cash register of the natural gas industry. Metering, sampling, and analysis are the three equally critical functions required to accurately determine the value of a natural gas stream. If procedures or results in any of these three critical areas are inadequate, the calculated value of the stream will be inaccurate." API Chapter 14.1.1.

Relator makes several allegations relating to Defendants' inappropriate methods of extracting gas samples. (Compl. ¶¶ 32, 34.) ASTM Designation D 5503-94 § 4.1 states, "A well-designed sample-handling and conditioning system is essential to the accuracy and reliability of pipeline instruments." More specifically, ASTM 5503-94 § 5 provides that the sample used to determine the heating content of natural gas must be "representative" of the gas stream as a whole. *Id*. ¶¶ 32, 34(a). API Chapter 14.1.5.2 similarly provides that "[s]ample probes and other components of sampling systems should be designed to deliver a representative sample of the flowing fluid." *Id*. ¶ 32(c). GPA Standard 2166-86 § 3.1 states, "The objective of any sampling procedure is to obtain a representative sample of hydrocarbons from the system under investigation. Any subsequent analysis of the sample, regardless of the accuracy of the analytical test, is inaccurate unless a representative sample is obtained." *Id*. ¶ 34(a).

Defendants challenge the allegations in paragraphs 37 and 51 of the complaints, arguing that the federal regulations do not prohibit the use of such devices (filters and portable chromatographs). However, Relator alleges that it is the *misuse* of those devices that contributes to the mismeasurement of the natural gas. Defendants also challenge the allegation in paragraph

43, asserting that Order No. 5 specifically authorizes the use of mechanical gas meters. Again, Defendants oversimplify Relator's allegation. Relator alleges that Defendants violate express provisions of Order No. 5 which require use of the gas meters within their range of accuracy, and further violate standards requiring accurate gas measurements. With respect to several of the allegations challenged by Defendants, Relator directly alleges that the described mismeasurement practice violates the applicable regulations and industry standards. *See* Compl. ¶¶ 33, 35, 36, 41.

Construing the facts of the complaints in the light most favorable to the Relator, the Court is not convinced that the Relator can prove no set of facts in support of his FCA claims against Defendants. Therefore, dismissal of the allegations challenged for failure to state a claim is not appropriate.

Improper Joinder

Defendants argue that Relator's complaints should be dismissed for improper joinder pursuant to FED. R. CIV. P. 20. Rule 20(a) provides in pertinent part:

> . . . All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A . . . defendant need not be interested in . . . defending against all the relief demanded. Judgment may be given . . . against one or more defendants according to their respective liabilities.

Defendants contend that Relator has failed to allege that his claims arise out of the same transaction or occurrence, or series of transactions or occurrences. The Relator has sued the numerous different Defendants in separate complaints, each one asserting, in paragraph 7 thereof, that the Defendants joined therein are affiliated with one another. Relator further alleges that those Defendants' Mismeasurement Techniques are "either undertaken in the same ways by the

same employees, or are subject to the same review and implementation procedures set by the same supervisory personnel." (Compl. ¶ 7.) Accordingly, Relator asserts, the Defendants joined in each separate action have acted in concert in violating the FCA.

The Court finds that the separate complaints joining groups of affiliated Defendants adequately assert a FCA claim against the named Defendants arising out of the same transaction, occurrence, *or* series of transactions or occurrences. The Court also finds that questions of law or fact common to all Defendants named in each action will arise in the action. Therefore, Defendants are properly joined pursuant to FED. R. CIV. P. 20.

Defendant Blue Dolphin Pipeline's Motion

The separate issue raised by Defendant Blue Dolphin Pipeline Company in its motion to dismiss is that it is fundamentally incapable of mismeasuring natural gas by using the methods described by the Relator in his Complaint. This argument is based upon the following factual assertions: 1) that Blue Dolphin has only one metering facility on its pipeline, a delivery meter; 2) that Blue Dolphin does not buy, own or sell gas that it transports; 3) that Blue Dolphin is not a lessee of the United States and does not pay any royalty; and 4) that Blue Dolphin's gas revenues are through-put charges based on the volume and heating value of gas measured at Blue Dolphin's single metering facility. These factual assertions are based upon affidavits attached to Blue Dolphin's motion. In conjunction with its motion to dismiss, Defendant Blue Dolphin has also requested sanctions against Relator Grynberg, arguing that the Complaint was filed in violation of FED. R. CIV. P. 11(b).

The argument advanced by Blue Dolphin requires a determination that the facts asserted are not in dispute. The Relator has responded to the motion for sanctions, and he has filed

affidavits in support of his position that the Complaint was filed in good faith and after a diligent inquiry into the Defendant's business practices. However, the Relator has not to date filed legal argument and supporting materials that would meet the substance of the Defendant's factual contentions. The Court is not inclined to decide these issues until they are presented to the Court in an adequately briefed and supported motion for summary judgment under FED. R. CIV. P. 56. As stated above, the present motions to dismiss are not well suited for conversion to motions for summary judgment. Therefore, the Court will deny Defendant Blue Dolphin's motion to dismiss and reserve judgment on the motion for sanctions.

For the forgoing reasons, it is hereby

ORDERED that the Coordinated Defendants' Motion to Dismiss is DENIED. It is further

ORDERED that the Enogex Defendants' Motion to Dismiss is DENIED. It is further

ORDERED that Defendant Blue Dolphin Pipeline Company's Motion to Dismiss is DENIED.

Dated this _____ day of May, 2001.

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United States District Judge